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No. 91-1982

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

GERALD WINTERS AND PAUL RAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a RICO conspiracy charge requires proof that the defendant agreed to "personally commit" at least two predicate racketeering acts.

2. Whether the jury may have found petitioner Winters guilty of a RICO conspiracy charge on a legally insufficient ground.

3. Whether the prosecution violated *Batson* v. *Kentucky*, 476 U.S. 79 (1986), when it used one of its peremptory challenges to strike an Hispanic venireperson.

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioner Winters' convictions (Pet. App. 1a-26a) and the judgment order of the court of appeals affirming petitioner Ray's conviction (Pet. App. 44a-45a) are unreported, but the judgments are noted at 958 F.2d 365 (Table). An opinion in a related case (Pet. App. 27a-41a), which was partially incorporated by reference as to petitioner Winters (Pet. App. 24a-25a), is reported at 956 F.2d 416.

JURISDICTION

The judgments of the court of appeals were entered on February 12, 1992. The petitions for rehearing were denied on March 11, 1992 (Pet. App. 42a-43a, 46a-

47a). The petition for a writ of certiorari was filed on June 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c). Petitioner Winters was also convicted of conspiracy to violate RICO, 18 U.S.C. 1962(d), and of additional counts involving conspiracy and extortion in violation of the Hobbs Act, 18 U.S.C. 1951, and the Travel Act, 18 U.S.C. 1952. The district court sentenced Winters to a total of 415 months' imprisonment, to be followed by three years' supervised release. In addition, Winters was fined $450,000 and ordered to forfeit $650,000. The district court sentenced petitioner Ray to a 37-month prison term, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. 1a-26a (Winters); *id.* at 44a-45a (Ray).

1. The evidence at trial established "a classic case of the type of criminal conduct that the RICO statute was intended to reach." Pet. App. 5a. Beginning in the early 1970s and continuing through 1988, petitioner Winters founded and ran an organization of entities engaged in door-to-door sales of candy in several States. *Id.* at 3a-4a. Petitioner Ray was a supervisor in the Houston, Texas, area. Gov't C.A. Br. 6. Petitioners used violence and threats of violence to thwart competition from other entities engaged in door-to-door candy sales. The threats and violence were directed against competitors' employees, including former employees of the Winters organization. Pet. App. 4a.

During jury selection, the defense objected to the government's peremptory challenges, claiming that they were based on a discriminatory motive in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986). Although the district court found that the defense had failed to raise a prima facie case of discrimination, the prosecutor stated his reasons for the exercise of each strike against a black venireperson. The district court concluded that the prosecutor's reasons were race-neutral and that the strikes were not based on a discriminatory intent. Pet. App. 32a-33a; C.A. Joint App. 566-567.

The jury returned special verdicts indicating that petitioner Winters committed five racketeering acts.[1] Those acts were established through proof of the following facts:

(a) In 1972, Winters threatened David Lawrenz, who ran a competing business in Milwaukee, Wisconsin, called Jobs for Kids. Lawrenz learned that his head supervisor's car had been vandalized by the Winters organization. Later, Winters told Lawrenz that Milwaukee was not big enough for both of them and that Lawrenz should join Winters' organization. When Lawrenz refused, Winters brandished a gun, told Lawrenz that he already had killed six people, and said that he would not hesitate to do so again if people got in his way. That night, several shots were fired

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[1] The jury made those findings both in returning its verdict as to the RICO conspiracy charge, C.A. Joint App. 129-132, and in returning its verdicts on the substantive RICO charge and the remaining counts, *id.* at 134-138. Petitioner Ray was found to have engaged in at least three acts of threatened violence and to have committed arson. See Gov't C.A. Br. 9-10; C.A. Joint App. 133. Ray does not raise any issues relating to the RICO charge in this Court. Pet. 9 n.3.

into Lawrenz's car, and Winters called to ask if he "g[o]t the message." Gov't C.A. Br. 7-8.

(b) On July 1, 1982, Winters and other members of his organization engaged in a brutal attack on Jim Anderson, who worked in Dallas, Texas, for a competing candy business. Winters personally used a baseball bat to strike numerous blows to Anderson's body. While striking the blows, Winters screamed at Anderson to "get out of the business and get out of Dallas." Winters then smashed the windshield of Anderson's car. Gov't C.A. Br. 8-9.

(c) On August 17, 1983, Grover Goodwin was severely beaten by two enforcers for Winters' organization. Goodwin, a former employee of the organization, had recently left to sell candy purchased from competing businesses. After the two men had finished pummeling Goodwin with a pipe, one of them asked whether Goodwin would continue to sell candy. Goodwin assured them he would not. Gov't C.A. Br. 10-11.

(d) On April 28, 1986, another former Winters' employee who had left the organization was brutally beaten. Rick Graef, who had participated with Winters in prior acts of violence, had left the organization to sell candy on his own. Two assailants subsequently entered Graef's Chicago-area hotel room and beat him severely with a baseball bat. While Graef was unable positively to identify either assailant because of the blood in his eyes, he testified he was "95 percent sure" that Winters was one of the assailants. Gov't C.A. Br. 11-12.

(e) In June 1987, Winters' employees broke the window of, and attempted to burn, a van belonging to Anthony Spatola, a former employee who had left to join a competing business. Winters had rented the Lincoln automobile seen in Spatola's driveway late in

the evening of the incident. Spatola subsequently discovered an open Sterno can upside down beside a burn mark in his van. When the Lincoln was returned to the rental agency by one of Winters' employees, the lid to a Sterno can and other suspicious materials were found in the trunk. Gov't C.A. Br. 12-13.

2. The court of appeals affirmed. Pet. App. 1a-26a, 44a-45a. The court rejected Winters' argument that the district court was required to instruct the jury that a RICO conspiracy charge requires proof that the defendant agreed to "personally commit" at least two predicate racketeering acts. *Id.* at 25a. The court indicated that it had previously concluded that RICO imposes no such requirement. *Ibid.*, citing *United States* v. *Adams*, 759 F.2d 1099, 1115-1116 (3d Cir.), certs. denied, 474 U.S. 906 and 474 U.S. 971 (1985).

The court of appeals also rejected Winters' claim that the evidence was insufficient to support his RICO conspiracy conviction. Pet. App. 5a-12a. Winters asserted that the government had to show that he conspired with the same person with respect to at least two racketeering acts. The court assumed that Winters was correct in stating that none of his co-defendants qualified for that role because the jury had acquitted them of the RICO conspiracy charge, and that two of the unindicted co-conspirators did not qualify for that role because the jury found that Winters did not agree to the acts they committed. *Id.* at 5a-6a. The court nevertheless concluded that "the evidence supports his conviction on the premise that he conspired with [unindicted co-conspirator] Rick Graef to violate [RICO] by agreeing to the commission of two racketeering acts." *Id.* at 8a-9a.

Finally, the court of appeals rejected the claim that the prosecution violated *Batson* v. *Kentucky*, 476 U.S.

79 (1986), by striking prospective black jurors from the panel on account of their race. Pet. App. 24a-25a (incorporating by reference *id.* at 28a-33a, 40a). The court held that the *Batson* challenge could be raised by all the defendants, regardless of race, under this Court's decision in *Powers* v. *Ohio*, 111 S. Ct. 1364 (1991) (holding that there is no requirement of racial identity between the defendant and the challenged jurors). Pet. App. 30a n.1. The court concluded, however, that the district court did not err in holding that the government gave race-neutral explanations for its strikes against black jurors and that the government did not have a discriminatory intent. *Id.* at 32a-33a.[2]

ARGUMENT

1. Petitioner Winters claims (Pet. 12-21) that the district court should have instructed the jury that a RICO conspiracy charge requires proof that the defendant agreed to "personally commit" at least two predicate racketeering acts. In early decisions addressing that issue, two courts of appeals stated that a conviction of RICO conspiracy requires that the defendant agree to personally commit two predicate crimes. See *United States* v. *Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984). The majority of the courts of appeals that have addressed the issue, however, have refused to impose such a requirement, and this Court has consistently denied petitions for writs of certiorari seeking review of the issue. See, *e.g.*, *United States* v. *Pryba*, 900 F.2d 748, 760 (4th Cir.), cert. denied, 111 S. Ct. 305 (1990);

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[2] The court of appeals also rejected several evidentiary and sentencing challenges that are not renewed in this Court. Pet. App. 12a-24a.

United States v. *Leisure*, 844 F.2d 1347, 1367 (8th Cir.), cert. denied, 488 U.S. 932 (1988); *United States* v. *Rosenthal*, 793 F.2d 1214, 1228, modified, 801 F.2d 378 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987); *United States* v. *Neapolitan*, 791 F.2d 489, 497-498 (7th Cir.), certs. denied, 479 U.S. 939 and 479 U.S. 940 (1986); *United States* v. *Joseph*, 781 F.2d 549, 554-555 (6th Cir. 1986); *United States* v. *Adams*, 759 F.2d 1099, 1116 (3d Cir.), certs. denied, 474 U.S. 906 and 474 U.S. 971 (1985); *United States* v. *Tille*, 729 F.2d 615, 619 (9th Cir.), certs. denied, 469 U.S. 845 and 469 U.S. 848 (1984). There is no reason for a different result here.[3]

A "personally commit" instruction does not accurately state the law, but even if it did, petitioner was not prejudiced by the district court's failure to give it. The jury, through special verdicts, found that petitioner personally committed the same five racketeering acts that the jury found he had conspired to commit. Petitioner concedes that the purported "agreement to personally commit" requirement is satisfied "not only by an agreement to actually physically commit the racketeering acts, but also by an agreement to aid and abet or cause the commission of the acts." Pet. 20, citing *United States* v. *Rastelli*,

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[3] Since this Court's most recent denial of certiorari in a case raising the "personally commit" issue, the Tenth Circuit stated in *United States* v. *Sanders*, 929 F.2d 1466, cert. denied, 112 S. Ct. 143 (1991), that "although th[e] issue may be ripe for reconsideration at a future time and upon an opportunity for fuller briefing by the parties, for purposes of this appeal we adopt the rule of law that the defendant must agree to personally commit two predicate acts, not merely agree to the commission of two predicate offenses by any conspirator." *Id.* at 1473. Given the tentative nature of the court's holding, and the fact that it expressly decided the issue only "for purposes of this appeal," the issue must be deemed to remain open in the Tenth Circuit.

870 F.2d 822, 831-832 (2d Cir.), cert. denied, 493 U.S. 982 (1989). Because the jury's special verdicts establish that that requirement was satisfied in this case, C.A. Joint App. 130-138, petitioner would not prevail even on the theory he advocates.

2. Winters also contends (Pet. 22-29) that the jury may have based his RICO conspiracy conviction on a legally defective theory with respect to RICO's pattern-of-racketeering-activity requirement. The evidence before the jury indicated that Winters and Graef agreed to commit three racketeering acts: (a) the February 1972 incident involving the threats made to David Lawrenz; (b) the July 1982 beating of Jim Anderson; and (c) the 1983 assault of Grover Goodwin. Pet. App. 9a-11a. Petitioner does not challenge the sufficiency of the evidence as to those acts.[4] Rather, he speculates (Pet. 22-24) that the jury may have relied only on the 1972 and 1982 acts in finding that he conspired to engage in a "pattern of racketeering activity." Petitioner bases that speculation on two premises: the jury was not instructed that a RICO pattern requires that the last of the racketeering acts must have "occurred within ten years * * * after the commission of a prior act of racketeering activity," 18 U.S.C. 1961(5), and the evidence of Graef's involvement in the 1983 Goodwin

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[4] In the court of appeals, petitioner acknowledged that the evidence was sufficient to establish that "Graef agreed with Winters to the commission of two racketeering acts" with respect to Lawrenz and Anderson. Pet. C.A. Br. 25. Although petitioner obliquely questioned the sufficiency of the evidence with respect to the Goodwin act, *id.* at 25 n.19, the court of appeals found that the evidence was sufficient to establish "Graef's participation with Winters in the commission of the assault on Grover Goodwin in 1983." Pet. App. 10a. Petitioner does not challenge that conclusion here.

act was supposedly "ambiguous" (Pet. 24). Relying on *Griffin* v. *United States*, 112 S. Ct. 466 (1991), and *Yates* v. *United States*, 354 U.S. 298 (1957), petitioner asserts that his conspiracy conviction cannot stand because one of the alternative theories on which it may rest is legally insufficient. Pet. 25-27.

Petitioner acknowledges that he did not object to the district court's omission to instruct the jurors that the last of the racketeering acts must have occurred within ten years after a prior act. Pet. 23 n.8. Because he did not object to the jury instructions in the district court, petitioner cannot prevail on appeal unless he establishes that it was plain error, undermining the fundamental fairness of the trial and resulting in a miscarriage of justice, for the court not to give an instruction regarding the ten-year element of the RICO "pattern" requirement. See Fed. R. Crim. P. 30, 52(b); *United States* v. *Young*, 470 U.S. 1, 16 (1985); *United States* v. *Contreras*, 950 F.2d 232, 240 (5th Cir. 1991); *United States* v. *Tillem*, 906 F.2d 814, 825 (2d Cir. 1990). Petitioner fails to satisfy that standard.

The jury's special verdicts show that the jury found that petitioner agreed to commit racketeering acts in 1972, 1982, 1983, 1986, and 1987. C.A. Joint App. 107-110, 130-133. If the focus is limited to racketeering acts in which Graef was also involved (the 1972, 1982, and 1983 acts), the last act plainly occurred within ten years of a prior act. Petitioner's speculation that the jury may have found that Graef was involved in the 1972 and 1982 acts, but not the 1983 act, is implausible given the strong evidence that Graef participated in that act. Pet. App. 10a-11a. Because there was ample evidence before the jury to establish a legally sufficient RICO "pattern," petitioner has fallen far short of demonstrating a miscarriage of justice by the

omission of the instruction regarding the ten-year requirement. See *United States* v. *Alkins*, 925 F.2d 541, 553 (2d Cir. 1991) (deficient RICO "pattern" instruction was not plain error in light of evidence showing each required element of a pattern); *United States* v. *Valencia*, 907 F.2d 671, 687 (7th Cir. 1990) (same, with respect to failure to give a "substantial step" instruction in an attempt charge).

Even if petitioner were correct in his claim regarding the racketeering acts involving Graef, he would still not be entitled to relief. The court of appeals analyzed his claim on the assumptions, which it accepted solely for purposes of argument, that (1) Winters could not have been found guilty of conspiring with any co-defendant who was acquitted of conspiracy, and (2) a RICO conspiracy conviction requires a finding that Winters conspired with the same person with respect to two racketeering acts. Pet. App. 6a, 8a. Both assumptions are incorrect.

First, there is no requirement that the jury act consistently in returning verdicts with respect to separate counts or separate defendants. *United States* v. *Powell*, 469 U.S. 57 (1984); *United States* v. *Zuniga-Salinas*, 952 F.2d 876, 878 n.2 (5th Cir. 1992) (en banc) (collecting conspiracy cases involving inconsistent verdicts among alleged co-conspirators). Thus, the acquittal of his co-defendants does not imply that the jury found that Winters did not conspire with them. Second, a defendant need not conspire with the same person to commit two specific racketeering acts; the RICO statute requires only that the defendant agree to participate in the conduct of the affairs of an enterprise through the commission of at least two racketeering acts. *United States* v. *Campione*, 942 F.2d 429, 436-437 (7th Cir. 1991). Because the evidence was sufficient to show that

Winters conspired with his co-defendants to commit at least two racketeering acts, his conviction is valid without regard to whether he also conspired with Graef.

3. Finally, petitioners renew their claim (Pet. 30-39) that the prosecution violated *Batson* v. *Kentucky*, 476 U.S. 79 (1986). While apparently not challenging the finding of the district court, upheld by the court of appeals, that the strikes of the black venirepersons were not racially motivated, petitioners claim that the court erred in failing to rule explicitly on their claim that there was a prima facie case of discrimination with respect to the strike of one Hispanic venireperson. That fact-specific claim does not warrant this Court's review. In any event, petitioners' claim lacks merit.[5]

The district court found that petitioners failed to establish a prima facie case of discrimination. The court stated that "I, quite candidly, do not see a prima facie case of discrimination here. I don't see any intent to discriminate, I don't see even an inference of discrimination." C.A. Joint App. 566. Petitioners offer nothing to suggest that that finding is clearly erroneous. Noting that the prosecutor struck five

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[5] Petitioners suggest (Pet. 39) that because the district court seemed to think that white defendants could not challenge strikes of black and Hispanic jurors and because the court of appeals did not expressly pass on the strike of the Hispanic juror, the court of appeals implicitly departed from this Court's decision in *Powers* v. *Ohio*, 111 S. Ct. 1364 (1991). The court of appeals, however, expressly held that any "requirement that there be racial identity between the defendant and the jurors subject to the peremptory challenge was eliminated by the Supreme Court in *Powers* v. *Ohio*." Pet. App. 30a n.1.

blacks, three whites,[6] and one Hispanic, *id.* at 551, 559, petitioners assert that "[t]he government's challenges of all minorities informs a court's decision as to whether the government discriminated against any one minority venireperson." Pet. 34-35 (citing *United States* v. *Alvarado*, 923 F.2d 253, 255-256 (2d Cir. 1991)). But in light of the concurrent finding of both courts below that the strikes of the black jurors were not racially motivated, those strikes can have no conceivable bearing on whether the Hispanic juror was struck for impermissible reasons. Likewise, petitioners err in focusing on the government's observation that half of the venire was black and the sequence of its strikes against blacks. Pet. 36-37. Those actions do not imply a discriminatory motive against Hispanics.[7]

Others factors also cut against an inference that the prosecutor exhibited an anti-Hispanic intent. The prosecution struck one Hispanic, the defense struck one Hispanic, and one Hispanic served on the jury. Gov't C.A. Br. 18. There was, therefore, no pattern of

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[6] As petitioners note, Pet. 35, one challenge was against a venireperson "of undetermined but possibly Arabic descent." The record does not make clear that venireperson's background.

[7] Similarly, petitioners err (Pet. 35-36) in seeking to draw an inference of discriminatory intent from the government's suggestion in the district court that the court should have supplemented the jury pool by including venirepersons from counties that were mistakenly omitted. C.A. Joint App. 286-292. As the district court noted, the omission of those counties was due to "administrative error," and the government simply sought to remedy that error. *Id.* at 292. Moreover, the district court had ample opportunity to take the government's conduct into consideration in determining whether it was acting out of a discriminatory purpose against minorities, and the court found that it was not.

arguably discriminatory acts by the prosecution. Moreover, one of the prosecutors and a key government witness, but no defendants or defense witnesses, were Hispanic, *id.* at 18-19; those circumstances suggest no reason why the government would not want Hispanic jurors. Finally, contrary to petitioners' suggestion (Pet. 37-38), the fact that the prosecution expressed satisfaction with the panel and declined a peremptory challenge at a time when the Hispanic venireperson in question was still sitting supports (rather than undercuts) the conclusion that its later strike was nondiscriminatory. See *United States* v. *Alvarado*, 951 F.2d 22, 26 (2d Cir. 1991); *United States* v. *Montgomery*, 819 F.2d 847, 851 (8th Cir. 1987).

Petitioners have therefore failed to establish a prima facie basis for believing that the strike of the Hispanic venireperson was motivated by a discriminatory purpose. Accordingly, the court of appeals did not err by affirming without remanding for an explanation of the prosecutor's reasons.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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